United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1168

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P/S

To be argued by
ROBERT J. COSTELLO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1168

UNITED STATES OF AMERICA,
Appellee,

—v.—

GENE L. SIMMS and ROBERT GEFFEN,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Gene L. Simms and Robert Geffen appeal from judgments of conviction entered on March 23, 1976, in the United States District Court for the Southern District of New York, after a five day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 75 Cr. 1262, filed on December 30, 1975, charged Simms and Geffen * with one count of conspiracy to defraud the United States, Title 18 United States Code, Section 371; two counts of making false statements to the Small Business Administration ("S.B.A."), Title 15,

*The indictment also named A. Michael Stagg and Ernest Kassab. Stagg pled guilty and Kassab was acquitted after trial of all counts.

United States Code, Section 645(a) and Title 18, United States Code, Section 2; and six counts of interstate transportation of money obtained by fraud, Title 18, United States Code, Sections 2314 and 2.

The trial commenced on January 12, 1976 and concluded on January 16, 1976, when the jury returned guilty verdicts on all nine counts against the defendants Simms and Geffen.

On March 23, 1976 Judge Pollack sentenced Simms to two years imprisonment on each count other than Count Two, to run concurrently, and two years imprisonment, execution suspended, and three years probation on the remaining count. Judge Pollack sentenced Geffen to concurrent terms of two years imprisonment, with six months to be served in a jail type institution and execution of the remainder of sentence suspended, followed by two years probation. Both Simms and Geffen are currently free on bail pending this appeal.

Statement of Facts

The Government's Case

The proof at trial established that in June, 1972, Hurricane Agnes struck the western part of Pennsylvania causing widespread damage. (Tr. 30).* Flood-damaged businesses became eligible for low interest loans from the Small Business Administration ("S.B.A."). (Tr. 307).

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* "Tr." refers to the trial transcript. "GX" refers to a Government Exhibit. "CX" refers to a Court Exhibit. "A" refers to the separate Appendix filed by Simms.

Since the S.B.A. loans took some time to process, the State of Pennsylvania made available interim short-term disaster loans to flood-damaged business enterprises. A flood-damaged business would apply for the short term state loan by sending a state application together with a copy of the S.B.A. application to the local Industrial Development Authority. The state application would be reviewed by the State Department of Commerce. (Tr. 30-31). To document the loss, the state required the flood-damaged businesses to submit invoices to show the amount of repairs. (Tr. 32; GX 3-30). Additionally, Pennsylvania sent a representative to the flood site to ascertain that there had been flooding, but no estimate was made by the state as to the amount of damages sustained. (Tr. 32). The S.B.A., on the other hand, in evaluating the federal loan, did use engineers to make an estimate of the damages incurred. (Tr. 312). After the loan was approved, the State would make a loan to the local Industrial Development Authority which in turn would make the loan to the flood-damaged business. The loan funds would be placed in an escrow account and the funds disbursed upon the submission of invoices or other evidence of repair. (Tr. 31).

In July, 1972, Stagg Holding Corporation ("Stagg Holding") applied to the S.B.A. for a business disaster loan in the amount of $702,042 for damages to a shopping center that a Stagg subsidiary was building in Huntingdon, Pennsylvania. (Tr. 308; GX 65). The application form was sent with a covering letter by the defendant Simms to Ernest Kassab for transmittal to the S.B.A. (Tr. 309; GX 66). In September, 1972, Stagg Holding submitted an application to the State of Pennsylvania for an interim loan of $702,000. (Tr. 33). The application to the state contained a copy of the S.B.A. application. (Tr. 41; GX 1, 2). The State application * was sub-

* The application was made by Stagg Holding Corporation, the parent company of Stagg of Huntingdon, Inc., that owned and was the general contractor of the shopping center in Huntingdon, Pennsylvania. (Tr. 41).

mitted to the Bellefonte Area Industrial Development Authority.

The principal officer of Stagg Holding and its subsidiaries was A. Michael Stagg. The defendant Gene Simms handled the administrative and financial end of the operation and the defendant Robert Geffen was an independent Certified Public Accountant employed by the Stagg Corporations.

The testimony at trial demonstrated that the State application together with financial statements of Stagg Holding and A. Michael Stagg were submitted to Irving Yaverbaum for review on September 28, 1972. (Tr. 64; GX 1, 2, 37, 38). Mr. Yaverbaum, a Certified Public Accountant, worked as a consultant to the Pennsylvania Department of Commerce, providing financial advice concerning the repayment ability of loan applicants. (Tr. 62). Shortly thereafter, the state requested further documentation in support of the requested loan of $702,000.

Albert Bisland,* the Secretary-Treasurer of Stagg Holding, testified that he was informed by Simms and Geffen that Stagg Holding was going to apply for an S.B.A. loan. (Tr. 95). Bisland was told by Simms to work with Geffen in filling out the S.B.A. application. Bisland stated that the information concerning the amount of damage that was used in both the federal and state loans was supplied by Frank DeAngelis,** the supervisor of construction, and A. Michael Stagg. DeAngelis originally estimated the damage at $300,000 but after

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* Bisland had been convicted in an earlier trial before Judge Pollack for his role in the scheme.

** DeAngelis pled guilty to an earlier indictment before Judge Pollack.

consultation with Stagg revised the figure to $702,000. (Tr. 99). In October, 1972, Simms told Bisland that Bisland and Geffen were going to meet Mr. Yaverbaum in Pennsylvania to provide him with the back-up documentation for the state loan. (Tr. 107). Bisland informed Simms that he had not received the invoices from the construction department. Simms then called DeAngelis into his office to find out where the invoices were. DeAngelis informed Simms that he was still trying to get the invoices together. Simms then called Stagg and Geffen into his office. During this meeting, Geffen suggested that they could use old invoices by whiting out the old information, typing in new information and photocopying them. (Tr. 107-111). While Simms did not comment, he was present during the course of the discussion. (Tr. 111).

Geffen, Bisland and DeAngelis spent the rest of the afternoon and evening preparing the fraudulent invoices. DeAngelis' initials appeared on all but one of the forged invoices and Geffen's original handwriting appeared on a majority of the forged invoices. (Tr. 87, 112; GX 3-30). Simms was not present while these invoices were being prepared, but returned later that evening to make sure everything was ready to go to Pennsylvania the next day. (Tr. 113).

On the following day, Geffen and Albert Bisland went to Pennsylvania, met with Mr. Yaverbaum and presented the fraudulent invoices to document the request for a loan of $702,000. (Tr. 65, 66, 116; GX 3-30). Upon returning to New York, Albert Bisland expressed his concern at various times to Geffen, Simms, and Stagg about the invoices, and was told not to worry about it. (Tr. 116-117).

Following the receipt of the back-up documentation, the Pennsylvania authorities approved a loan in the amount of $664,000.* (Tr. 45, 69). The proceeds of

* Items of overhead had been disallowed.

the loan were placed in an escrow account in the People's National Bank in State College, Pennsylvania. The funds were thereafter disbursed by means of requisitions submitted. (Tr. 48-49, 231, 232; GX 31-35). Following each requisition the funds were transferred from the escrow account to a regular checking account of Stagg Holding in State College, Pa. Checks were then drawn on the regular checking account in State College payable to Stagg Contracting Corporation and deposited in the First National City Bank in New York. (Tr. 232-239, 312; GX 72, 74, 76, 77, 79, 81, 82). Marie Peduto, a bookkeeper at Stagg, was then instructed by Geffen and Bisland, with the approval of Simms, to "cut" checks payable to the vendors named in the fraudulent invoices, Government Exhibits 3 through 30, but to hold the checks and not mix them with the regular checks. (Tr. 247, 248; GX 41-47). Geffen then instructed Bisland to have the purchase journal re-written so the fraud would escape detection if the company's books were audited. (Tr. 122). Thereafter, the checks that were payable to individual contractors were cashed by Marie Peduto and Albert Bisland pursuant to the direction of Simms and A. Michael Stagg. The checks that were payable to a corporation were deposited in the account of Harrisburg Excavating & Equipment Company ("Harrisburg"), a company owned by A. Michael Stagg with Albert Bisland as its nominal President.* (Tr. 249).

In December, 1972, Gerald Garner, the Assistant Branch Manager for the S.B.A., wrote to Simms confirming an earlier telephone conversation and requesting, *inter alia*, further information concerning the amount of damages suffered by the Huntingdon, Pennsylvania shopping

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* Harrisburg was set up as a "totally independent company" by Simms and Stagg, using Stagg employees as nominal officers. (Tr. 250-251).

center. (Tr. 310-315; GX 67). Simms had told Garner during the telephone conversation that Pennsylvania inspectors had made an estimate or appriasal of the damages. Garner wrote to Simms and explained that the engineers from the S.B.A. had been unable to reconcile the differences in appraisals. (Tr. 314; GX 67).

As a result of the letter and the telephone conversation, a meeting was held in January, 1973, at the S.B.A. office in Harrisburg, Pennsylvania. Geffen, Bisland, DeAngelis, and Robert Bloech * attended on behalf of Stagg. (Tr. 318-319). Following that meeting, Garner again wrote to Simms, in February, 1973, requesting additional information. (Tr. 320; GX 68).

Shortly after the January, 1973, meeting with the S.B.A., Bisland and DeAngelis told Bloech that they needed photographs of the flood damage to submit to the S.B.A. In particular, Bloech was instructed to go to a similar shopping center under construction in Phillipsburg, Pennsylvania to spread mud around and blow up the floors and then photograph them. Bloech did that and gave those pictures to Frank DeAngelis. (Tr. 128, 296-301; GX 69). Bisland then prepared Government Exhibit 69, a folder which contained, *inter alia*, the forged invoices and the false pictures, for submission to the S.B.A. (Tr. 129, 130; GX 69). The folder was then sent with a covering letter by Gene Simms to Gerald Garner of the S.B.A. in Harrisburg, Pennsylvania. (Tr. 130; GX 70).

The Defendants' Case

Simms testified in his own behalf (Tr. 401-539) and presented six character witnesses. Geffen's case consisted of eight character witnesses.

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* Bloech pled guilty to an earlier indictment involving his role in this scheme.

ARGUMENT

POINT I

The re-direct examination of Garner was entirely proper.

The defendant Simms contends that the trial court erred in allowing Gerald Garner to testify on re-direct examination that one of the reasons he particularly remembered the Stagg Holding application was that there had been a congressional inquiry in connection with it. Additionally, Simms contends that that testimony permitted the jury to draw an inference adverse to Simms' claim that he had no knowledge of wrongdoing in connection with the loan applications. These contentions are totally without merit.

On direct examination, Garner testified that in December, 1972, he had a telephone conversation with Simms. During the course of that telephone conversation, Simms told Garner that state engineers had made an *appraisal* of the damage suffered by the shopping center. (Tr. 314). Shortly after that telephone call, Garner wrote to Simms requesting further clarification of "the differences between our appraisals and the losses indicated by the engineers employed by yourself and the state." (Tr. 312; GX 67).

On cross-examination, Simms' counsel elicited the fact that Garner had processed thousands of applications in connection with the flooding caused by Hurricane Agnes. (Tr. 323-330). The import of the cross-examination was clear that since Garner had processed thousands of applications including at least a dozen in which interim financing had been given by Pennsylvania, Garner could not possibly have remembered or relied on the fact that Simms had stated that the state had conducted appraisals

of damage as opposed to mere inspections that damage had occurred.*

Simms now claims on appeal that the reference to thousands of applications did not attack the recollection of the witness, but merely served to point out that this loan was no different than other loans. Even if this hindsight interpretation is correct—and the anomaly of the claim strongly indicates that it is not—the government's response was appropriate. For even under the retrospective interpretation given to cross-examination, the inference is clear that Garner could not have remembered Simms saying that there was a state appraisal since this application was substantially similar to the others and Garner knew or should have known that the state did not conduct appraisals. (Tr. 328-329).

The scope of re-direct examination is within the sound discretion of the Court. *United States* v. *Hodges*, 480 F.2d 229 (10th Cir. 1973); *Chapman* v. *United States*, 346 F.2d 383 (9th Cir.), *cert. denied*, 382 U.S. 909 (1965). It is appropriate on re-direct examination to reply to new matters and inferences elicited on cross-examination. *See United States* v. *Falange*, 426 F.2d 930, 935 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970).

The government's response to the defense intimation that Garner could not have remembered the facts of

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* The thrust of the cross-examination is clear from the following questions asked by Simms' counsel:

"Q. Sir, having in mind that you dealt with thousands of these applications, having in mind that you dealt with at least a dozen where the State of Pennsylvania had granted interim loan financing, do you want to leave it, sir, that you relied on Mr. Simms as to the extent as to which State engineers made an appraisal? A. No.

Q. You relied upon Mr. Blankenship principally with regard to that, isn't that correct? A. No." (Tr. 329-330).

this particular loan application among the many that he processed was entirely appropriate. The re-direct examination as to why this application stood out in Garner's mind was directly responsive to the inferences raised on cross-examination, (Tr. 331-332) and the District Court judge acted entirely within his discretion in allowing it. Simms' additional claim of a general prejudice against anyone connected with an application as to which there has been a congressional inquiry falls of its own weight, particularly in view of the care with which the District Court limited the questioning to a single reference to the fact of a congressional inquiry without any further elaboration. (Tr. 333).

POINT II

The cross-examination of Simms' character witness was proper.

Simms contends for the first time on appeal * that the cross-examination of a character witness, Howard Weiss,** on the basis of specific acts of misconduct by the defendant, was improper because it was highly prejudicial towards the defendant. By failing to object in the Court below on the grounds now asserted on appeal,

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* Simms objected below solely on the ground that there was a power of attorney from Simms' sister to Simms allowing him to sign her name. In particular, in two written motions submitted to the Court and marked as Court's exhibits 4 and 6, Simms contended that the prosecutor lacked a good factual foundation for the question—a contention he has dropped on appeal. He did not contend that the questions themselves were improper, nor was any objection made to the question insofar as it related to skimming funds.

** Simms refers to this witness as "Marvin Weiss", Brief at 17, although the transcript gives his name as Howard J. Weiss (Tr. 549).

Simms has waived any such objection. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966). However, even if the proper objection had been made, the cross-examination was within the bounds of discretion of the District Court, and in any event the Court sustained Simms' objections, and [illegible]d the witness from answering the questions.

By putting character witnesses on the stand, Simms placed his character in issue. *Michelson* v. *United States*, 335 U.S. 469 (1948); *United States* v. *Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969). In this case the character witness testified as to Simms' reputation for truth, veracity *and honesty*. (Tr. 550). "The allowable scope of the impeaching inquiry should be tested by comparison with the reputation asserted." *United States* v. *Kelner*, Dkt. No. 75-1290, slip op. at 3169 (2d Cir. April 9, 1975). The questions asked by the Government dealt with the character trait asserted, namely honesty. It is clear that where a witness has testified as to the good reputation of the defendant in the community, the Government may inquire as to the witness' knowledge of prior offenses since that knowledge bears on the credibility and reliability of the witness' assertion. *United States* v. *Bermudez*, 526 F.2d 89, 95 (2d Cir. 1975).

In the instant case Simms placed his reputation for honesty in issue. Weiss testified that he visited the Stagg offices and knew the defendant's sister. (Tr. 551). The Government's next question inquired whether the witness ever discussed with people who knew Simms that Simms had put his sister on the payroll, although she did no work, and had her checks deposited in his personal account. (Tr. 552). The question was entirely proper since it sought to test both the knowledge and credibility of the witness for his assertion that Simms had a good reputation for honesty. In any event Judge Pollack, in

his discretion, sustained Simms' objections * to the [illegible] of questioning. (Tr. 552). Even assuming *arguendo* that the questions were improper, any error would be harmless. *United States v. Kelner, supra*, at 3169.

POINT III

The prosecutor committed no error in summation.

Simms contends that the District Court erred in allowing the Government in its summation to characterize a defense objection as a "funny little stunt" and to note that the defense had "objected to the Government trying to bring out the truth that Mr. Bisland was convicted in this case." (Tr. 730). Simms also claims error in allowing the Government, in rebuttal summation, to argue that the credibility of two Government witnesses was bolstered by the failure of the defense to cross-examine them. Finally, for the first time on appeal, Simms objects to the reference to 3500 material in the Government's summation. These claims are without merit.

During the direct examination of Albert Bisland, the Government attempted to elicit that Bisland had been convicted at an earlier trial for his role in the same scheme. Defense counsel for Simms and Geffen objected and the objection was sustained. (Tr. 131). On cross-examination, Geffen's counsel, over a Government objection, elicited the same information. In responding to the Government's objection, Judge Pollack noted that

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* There was no request by defense counsel to show a good-faith basis for the questions. The Grand Jury minutes of Marietta Voto, Simms' sister, were available to the District Court had the issue been raised, and are available for inspection by this Court *in camera* should it be required.

defense counsel had objected to the Government eliciting the same information, and further explained to the jury that he had been in error in sustaining the defense objection to the Government's question and then allowed the witness to answer the question. (Tr. 157-158).

In summation, the prosecutor told the jury:

> "Now you are going to evaluate the credibility of the witnesses. That's what the case is about. Not on the basis of funny little stunts like the objection to Mr. Bisland testifying that he was convicted in this case."

At this point counsel for Geffen objected and the objection was overruled. During the colloquy that ensued the Government attorney told the Court that the defense had objected "to the Government trying to bring out the truth that Mr. Bisland was convicted in this case." (Tr. 730). Simms' contention on appeal is that those statements impugned the integrity of defense counsel. That contention is without support from the record.

The statement that the defense had objected to the Government's attempt to elicit the same informaion was factually correct and in the context in which it was said could not be interpreted as an attack on defense counsel. Moreover, if there was any possibility of such an interpretation it was fully cured by Judge Pollack's immediate and careful statement to the jury.* (Tr. 730).

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*Judge Pollack noted: "I have already explained to the jury that a question was asked and it was the Court's error in blocking the question. And when the matter came up again, I permitted the question to be asked. Whether it is asked on one side of the case or the other side of the case, the only significant fact is what is fact. There is no inference to be drawn from who asked the question.

That is the fault of the umpire at that particular play. Excuse me." (Tr. 730-731).

The Government was clearly entitled to ask an impeaching question of its own witness. FED. R. EVID. 607; *United States* v. *Rothman*, 463 F.2d 488, 490 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972); *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969). The characterization of the episode as a "funny little stunt" was factually correct. Indeed, the defense by its objection during the direct examination sought to "[create] a misleading impression . . . that the Government is seeking to keep something from the jury," in exactly the manner castigated in *Del Purgatorio*, *supra*. While the language may have been blunt, it clearly does not constitute reversible error. The Government was merely pointing out that it was not trying to hide any facts relating to the credibility of Bisland and that the defense objection was a stratagem designed to give the jury the impression that the Government was seeking to keep evidence from the jury. There is no reversible error simply because language is blunt and to the point, where there is a factual basis in the record for the comment. *United States* v. *Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974).

Simms also contends that the District Court erred in permitting the Government in summation to argue that the credibility of Marie Peduto was enhanced by the failure of defense counsel to cross-examine her. In particular, he asserts that this shifted the burden of proof to the defendant and forced him to establish his innocence. This argument is specious.

During Simms summation, Marie Peduto's testimony was attacked as being "very general" in showing that Simms was aware of what was going on. (Tr. 752-753). In direct response to that attack, the Government, in its rebuttal summation, pointed out that Simms had failed to cross-examine Marie Peduto. This did not in any way shift the burden of proof. It was merely a way of pointing out that the witness' testimony stood unrefuted

and that to the extent the testimony was "very general," it remained so with the acquiescence of the defense counsel. Comment on defense failure to cross-examine a witness is not improper when the credibility of that witness has been attacked by the defense in summation. *United States* v. *Gimelstob*, 475 F.2d 157, 163 (3d Cir.), *cert. denied*, 414 U.S. 828 (1973); *see also United States* v. *Joyner*, 492 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 419 U.S. 852 (1974); *United States* v. *Lepiscopo*, 458 F.2d 977 (10th Cir. 1972).

Simms further contends, for the first time on appeal, that there was error with respect to the Government's comment on the failure of the defense to cross-examine Frank DeAngelis in spite of the fact that they had the 3500 material in their possession. The defendant Simms by his failure to object below, has waived consideration of any possible error. (Tr. 802-805). *United States* v. *Canniff*, 521 F.2d 565 (2d Cir. 1975), *cert. denied*, — U.S. —; 96 S. Ct. 796 (1976).

Moreover, even if the proper objection had been made, Judge Pollack cured any possible error in connection with the reference to the 3500 material by instructing the jury * that they could draw no inference against the

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* Judge Pollack instructed the jury:

"Now, ladies and gentlemen, the argument that is now being made is not to be construed in any way whatsoever, and I direct you that you may not consider that the mere fact that the lawyers in the exercise of their discretion decided not to cross-examine does not imply that any statements of their clients or of any witnesses that they have before them would have been prejudicial to the defense, or that the statements contained evidence against the defendants. All you are entitled to understand from the facts of the argument that has been made thus far is that statements were delivered. We don't know what their contents were, and you may not speculate on their contents, nor may you draw any

[Footnote continued on following page]

defendants with respect to the 3500 material.* Finally, no further curative instruction was requested by any defense counsel. *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

POINT IV

The District Court's admonition to counsel did not deprive Geffen of a fair trial.

Defendant Geffen claims that he was denied a fair trial on the basis on the District Court's comments to defense counsel when Geffen's lawyer interrupted the prosecutor's summation. This claim is without foundation in either the record or the law.

During the course of the Government's rebuttal summation, the prosecutor noted that defense counsel had the 3500 material of Frank DeAngelis, a government witness, in their possession. Counsel for Geffen objected to the prosecutor's remark on the basis that the 3500 material had been given to defense counsel on the eve of testimony.** The following colloquy then occurred:

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inference that there is anything in there that is prejudicial to the defendants.

What you may note, however, is that when a witness takes the stand, he submits his credibility to the jury. In that connection there was no cross-examination, so that you have the issue of this credibility without any cross-examination. Go ahead." (Tr. 804-805).

* In addition, there could have been no prejudice by virtue of the reference to the 3500 material since it had been made clear to the jury that defense counsel had the 3500 material in their possession. (Tr. 72, 301).

** The objection was factually incorrect. The 3500 material for Frank DeAngelis had been turned over on Friday, January 9, 1976, three days before DeAngelis testified.

"The Court: Mr. Rothblatt and Mr. Rubino, I am surprised that you said that. I think you have had those documents long prior to trial.

Mr. Rothblatt: Not the essential witnesses, no, your Honor. We were handed a batch of testimony.

The Court: You were handed the documents as required by law, and you have the documents. That is the end of this.

I don't want you to interrupt the summation. You are deliberately interrupting the summation. I ask you to desist." (Tr. 802-803).

The Court's comments can in no way be interpreted as in any way prejudicing Geffen's trial. The comments were proper and were exclusively directed toward defense counsel and constituted an appropriate response to correct a misstatement of fact and to warn counsel to desist from unwarranted interruptions. *See United States* v. *Boatner*, 478 F.2d 737 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973); *United States* v. *Simpkins*, 505 F.2d 562 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). The statements by the Court cannot be reasonably interpreted as an attack on either counsel or Geffen. As Judge Pollack noted:

> "In the court's view there was no denigration of counsel, and certainly no conceivable damage to the defendant or his right to an effective representation of counsel or a fair trial." (Tr. 851).

Moreover, any possible prejudice was cured by the Court's careful instruction to the jury:

> "No inference as to guilt or innocence of any defendant on trial, or after the credibility of a witness, should be drawn from any rulings that I have made. . . . They were not intended to suggest any opinions as to guilt on innocence of any de-

fendant or as to the credibility of anyone who appeared before you. It is neither my intention nor my function to favor one side or the other or to imply that I have any views as to the credibility of any of the witnesses or as to the guilt or innocence of any of the defendants. That is your sole and exclusive function." (Tr. 815).

POINT V

The District Court properly denied defendant Geffen's motion to dismiss the indictment.

Geffen's final contention on appeal is that the District Court erred in denying his pre-trial motion to dismiss the indictment. (Geffen Brief 11-14).

By a Notice of Motion dated November 7, 1975, Geffen moved to dismiss indictment 75 Cr. 971 (MP)* on the ground that Geffen had been denied his Fifth Amendment rights by not being permitted to read his statement to the Grand Jury. Judge Pollack denied that motion on November 11, 1975. Geffen claims that if he had been permitted to read that statement himself to the Grand Jury, they would not have indicted him. This argument is completely frivolous.

On June 18, 1974, Robert Geffen appeared and gave testimony before a Grand Jury. Near the end of that testimony Geffen requested that he be permitted to read a lengthy statement written by him to the Grand Jury. The Foreman of the Grand Jury consulted with the Grand Jury and declined to allow Geffen to read the statement. Geffen concedes that the statement was marked as a Grand Jury Exhibit and was later read to the Grand Jury by the Assistant United States Attorney. What Geffen fails

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* That indictment was superseded by 75 Cr. 1262.

to point out to the Court, however, is that this procedure was specifically agreed to by defendant Geffen, (Tr. 356) as was shown by the Grand Jury minutes read into the trial record by Geffen's counsel.*

Even assuming that the Grand Jury had refused to hear the statement of defendant Geffen, there would be no reason to dismiss the indictment. The law is clear that the validity of an indictment is not subject to challenge on the ground that the Grand Jury acted on the basis of inadequate or incompetent evidence. *United States* v. *Calandra*, 414 U.S. 338 (1974); *United States* v. *Weinstein*, 511 F.2d 622 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975). In addition, the Government is under no obligation to call all available witnesses to the Grand Jury or to present particular evidence that may be favorable to the accused. *United States* v. *Eucker*, Dkt. No. 75-1246 slip. op. at 2460 (2d Cir. March 8, 1976); *United States* v. *Koska*, 443 F.2d 1167 (2d Cir.), *cert. denied*, 404 U.S. 852 (1971).

Particularly in view of the fact that all the factual matter Geffen wished to address to the Grand Jury was in fact, heard by that body, this claim is frivolous.

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* "Mr. Mukasey: The Grand Jury Foreman—correct me if I'm wrong—has decided that what they would like to do is to take your statement which has already been marked as Grand Jury Exhibit 17 and to have it read to them in its entirety at a later date when there's somewhat more time than there is now, since the time is getting late and there are other witnesses who have to testify.

They will consider the statement in its entirety, and if they have any questions after hearing that statement, either about the statement or any other testimony you have given, they will ask you to come back at a later date?

Is that procedure satisfactory to you?

The Witness: Yes." (Tr. 397-398).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT J. COSTELLO,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

ROBERT J. COSTELLO being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of June , 1976 he served ~~xxxxxx~~/of the within BRIEF
2 copies
by placing the same in a properly postpaid franked envelope addressed:

ROTHBLATT, ROTHBLATT, SEIJAS & PESKIN, ESQ.
232 WEST END AVENUE
NEW YORK, N. Y. 10023

JOSEPH J. BALLIRO, ESQ.
63 EAST INDIA ROW, 30F,
BOSTON, MASS. 02110

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Robert J. Costello
ROBERT J. COSTELLO

Sworn to before me this
23rd day of JUNE, 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977